

No. SC83933

IN THE
SUPREME COURT OF MISSOURI

STATE EX REL. FORD MOTOR COMPANY,

Relator,

-vs-

THE HONORABLE EDITH L. MESSINA, JUDGE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI,

Respondent.

RELATOR'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	2, 3
REPLY	4
I. Introduction	4
II. The Relief Sought by Relator is Within This Court’s Standard of Review. .	6
III. The Record Demonstrates Plaintiffs Conducted No Prior Discovery on the Subject Matter Allegedly Requiring the Depositions of Four Apex Employees.	7
IV. Rule 56.01 Requires the Analysis of Deposition Notices for “Apex” Employees as Enunciated in Crown Central.....	10
V. The Case Law Cited by Respondent Supports Relator’s Position on “Apex” Depositions	11
VI. The Depositions of Relator’s “Apex” Employees Will Result in Significant Disruption and Cost Compared to the Marginal Relevance of the Discovery Sought	18
CONCLUSION.....	20

TABLE OF AUTHORITIES

<u>A.I.A. Holdings, S.A. v. Lehman Bros. Inc.</u> , 2000 WL 1538003 (S.D.N.Y. 2000).....	15
<u>Armstrong Cork Co. v. Niagra Mohawk Power Corp.</u> , 16 F.R.D. 389 (S.D.N.Y. 1954)	15
<u>Boales v. Brighton v. Builders, Inc.</u> , 29 S.W.3d 159 (Tex. Ct. App. 2000).....	16
<u>Crown Central Petroleum Corp. v. Garcia</u> , 904 S.W.2d 125 (Tex.1995).....	4, 10
<u>Ierardi v. Lorillard, Inc.</u> , No. Civ. A. No. 90-7049, 1991 WL 158911 (E.D. Penn. August 13, 1991).....	9, 13, 14
<u>In re Daisy Mfg. Co., Inc.</u> , 976 S.W.2d 327 (Tex. Ct. App. 1998).....	8
<u>Fogelbach v. Dir. of Rev.</u> , 731 S.W.2d 512 (Mo. Ct. App. 1987)	10
<u>Marker v. Union Fidelity Life Ins. Co.</u> , 125 F.R.D. 121, 126	14
<u>Mulvey v. Chrysler Corp.</u> , 106 F.R.D. 364 (D.R.I. 1995).....	11
<u>Naftchi v. New York Univ. Med. Ctr.</u> , 172 F.R.D. 130 (S.D.N.Y. 1997)	9, 11, 12, 13
<u>Overseas Exch. Corp. v. Inwood Motors</u> , 20 F.R.D. 228 (S.D.N.Y. 1956)	9, 13
<u>Parkhurst v. Kling</u> , 266 F. Supp. 780 (E.D. Pa. 1967)	14
<u>Simon v. Bridewell</u> , 950 S.W.2d 439 (Tex. Ct. App. 1997).....	15, 16
<u>Six West Retail Acquisition, Inc. v. Sony Theater Management Corp.</u> , 2001 WL 1033571(S.D.N.Y. 2001).....	15
<u>Speadmark, Inc. v. Federated Dept. Stores, Inc.</u> , 176 F.R.D. 116 (S.D.N.Y 1997).....	15
<u>State ex rel. Linthicum v. Calvin</u> , No. SC83558, 2001 WL 1285693 (Mo. Oct. 23, 2001)..<	6,7
<u>State ex rel. Police Retirement Sys. v. Mummert</u> , 875 S.W.2d 553, 555 (Mo. 1994)	7

<u>State ex. rel. Riverside Joint Venture v. Missouri Gaming Comm'n</u> , 969 S.W.2d 218 (Mo. 1998).....	6
<u>State ex rel. York v. Daugherty</u> , 969 S.W.2d 223 (Mo. 1998)	7
<u>Union Sav. Bank v. Saxon</u> , 209 F. Supp. 319 (D.D.C. 1962).....	19

RULES OF CIVIL PROCEDURE

Mo.R.Civ.P. 56.01	1, 3, 4, 5, 7, 8, 10, 21
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REPLY

I. Introduction

Respondent's Brief concedes plaintiffs failed to conduct any less intrusive discovery concerning the issue purportedly requiring the deposition of the CEO of Ford Motor Company and three other high-level corporate employees: the "stark contrast" alleged to exist between Ford's handling of the Firestone recall and perceived "problems" 15 years ago with Continental General tires on Ford Bronco II vehicles. (Exhibit C to Ford's Petition for Writ of Prohibition and/or Mandamus; Respondent's Brief at p. 41) ("Firestone issue"). Instead, Respondent relies on plaintiffs' voluminous production of internet printouts and transcripts regarding the recall concerning Firestone tires—a recall relevant in neither time or product to the Bronco II and Continental General Tires at issue in the underlying lawsuit.

Rule 56.01 requires plaintiffs to conduct discovery in a manner that is reasonably calculated to lead to the discovery of admissible evidence, a requirement clearly not met by plaintiffs. The evidence before Respondent was not sufficient to require the CEO and the other noticed individuals to appear for a deposition in the underlying lawsuit.

The implicit requirements of Rule 56.01 have been acknowledged by the Courts who have adopted the "apex" deposition framework detailed in Crown Central Petroleum Corp. v. Garcia, 904 S.W.2d 125 (Tex.1995) Under these guidelines, which were developed in the context of interpreting a scope of discovery analogous to Mo. R. Civ. P. 56.01, it is clear Respondent's denial of Ford's Motion for Protective Order/Motion to Quash

was improper because: (1) plaintiffs conducted no prior discovery on the Firestone issue; and (2) the noticed individuals lacked unique or superior knowledge on the Firestone issue.

The cases cited by Respondent for the proposition that these depositions are within the scope of Rule 56.01 are easily distinguishable on their facts, and actually support Relator's position. Respondent's contention that requiring the CEO¹ of one of the world's

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1. Respondent correctly notes that Mr. Nasser is no longer the CEO of Ford Motor Company. However, the deposition notice remains improper for Mr. Nasser as well as the other Ford officers/employees for the reasons discussed in these proceedings. In addition, Ford has no obligation -- and no power -- to produce him for a deposition. Plaintiffs, of course, may seek to compel Mr. Nasser's attendance at a deposition in the same way they may seek to compel the attendance of any non-party witness, by requesting a subpoena be issued by the appropriate court and served on Mr. Nasser. A motion to quash such a subpoena would be proper, however, for the same reason that Ford's motion for a protective order should have been granted by the trial court. In fact, the potential for harassment is, if anything, even greater for retired "apex" witnesses. Retired CEOs, such as Mr. Nasser could be deposed in any case in involving their former employers merely because they might have some knowledge relevant to some issue in the case. Accordingly, they would either be unable to devote time to their duties for their new employers -- or they would be forced to spend their retirement giving depositions.

largest corporation to appear for deposition without any less burdensome discovery is contradictory to plaintiffs' tactics in this very lawsuit. Further, Ford's attempts to reasonably accommodate plaintiffs' discovery requests does not affect Respondent's abuse of discretion by denying Ford's Motion for Protective Order and/or Motion to Quash and Ford's Motion for Reconsideration.

II. The Relief Sought by Relator is Within This Court's Standard of Review

Respondent's lengthy discussion on the standard of review is predicated on a case where gaming license holders sought writs to prohibit the Missouri Gaming Commission from proceeding with a hearing to determine whether gaming facilities violated constitutional limitations. See State ex. rel. Riverside Joint Venture v. Missouri Gaming Comm'n, 969 S.W.2d 218 (Mo. 1998).

However, in a opinion published after Relator's Brief was filed, this Court in State ex rel. Linthicum v. Calvin, No. SC83558, 2001 WL 1285693, at *1 (Mo. October 23, 2001), summarized the standard of review applicable to a writ of prohibition: "[p]rohibition will lie only to prevent an abuse of discretion, to avoid irreparable harm to a party, or to prevent exercise of extrajudicial power." Linthicum, No. SC83558, 2001 WL 1285693, at *1 (citing State ex rel. York v. Daugherty, 969 S.W.2d 223, 224 (Mo. 1998)). "Nevertheless, prohibition may be appropriate to prevent unnecessary, inconvenient, and expensive litigation." Id. (citing State ex rel. Police Retirement Sys. v. Mummert, 875 S.W.2d 553, 555 (Mo. 1994)). Ford's writ of prohibition seeks to prohibit Respondent from denying Ford's Motion for Protective Order and/or Motion to Quash and Ford's Motion for Reconsideration

because Respondent did not require plaintiffs to seek less burdensome discovery on the Firestone issue, and because Respondent did not require a showing the “apex” employees had unique or special knowledge of the Firestone issue. The record established the requested deponents had no unique or superior knowledge of the Firestone issue, no knowledge of the facts at issue in this lawsuit, and Ford’s CEO was not even with Ford’s North American operations when the subject vehicle was produced. The procedure and relief sought falls squarely within Linthicum.

III. The Record Demonstrates Plaintiffs Conducted no Prior Discovery on the subject matter allegedly requiring the depositions of four apex employees

Respondent’s brief illustrates why the denial of Relator’s Motion for Protective Order and/or Motion to Quash and Ford’s Motion for Reconsideration exceeded the scope of Rule 56.01. At the hearing and now in briefing, plaintiffs submitted hundreds of pages of internet printouts and transcripts prepared by plaintiffs concerning the Firestone recall on Ford Explorers. The Firestone recall has a well documented public history, and the Ford employees requested by plaintiffs have been or will be deposed in the MDL litigation. However, plaintiffs concede this irrelevant issue is not the subject matter plaintiffs seek the depositions at issue. Instead, plaintiffs identify the issue requiring these depositions as “the reasons for the contrasts between Ford’s behavior in the Explorer and Firestone situation and Ford’s conduct relative to the Bronco II and GT52S concerns.” (Respondent’s Brief at p. 41.)

Respondent’s Brief fails to identify one deposition on this subject matter. Moreover, Respondent’s Brief fails to identify one interrogatory on this issue. Instead,

Respondent's Brief provides numerous quotes from Mr. Nasser solely relating to the recall of Firestone tires. However, these broad and general statements are insufficient grounds to subject Mr. Nasser to deposition in a products liability suit involving a different model vehicle designed over a decade prior to those statements—and before Mr. Nasser was even with Ford's North American operations. "Merely because a corporate official espouses a generalized opinion concerning the safety of one of his company's products does not imbue that official with unique or superior knowledge of the product." In re Daisy Mfg. Co., Inc., 976 S.W.2d 327, 329 (Tex. Ct. App. 1998). Respondent's approach unfairly targets CEOs who make generalized statements about their products. Simply pointing to unrelated statements does not meet the requirements of Rule 56.01.

In contrast, Respondent did not consider the affidavits filed by Ford concerning the knowledge of these individuals. If Respondent considered the fact Mr. Nasser was not in North America when the subject vehicle was designed, she could not have concluded he had knowledge about the use of Continental General Tires on the Ford Bronco II in 1987. (See Exhibit B to Exhibit E attached to Ford's Petition for Writ of Prohibition and/or Mandamus). If Respondent considered Mr. Rintamaki's statements concerning his work as an attorney in the corporate finance department, she could not have ordered his deposition on the Firestone issue. (See Exhibit F attached to Ford's Petition for Writ of Prohibition and/or Mandamus). There is simply no evidence in the hearing transcript or elsewhere in the record that Respondent considered this information. Ford's affidavits demonstrate the requested deponents simply have no superior or unique knowledge regarding

the differences perceived to exist between the current Firestone/ Ford Explorer litigation and perceived “problems” 15 years ago with Continental tires on Ford Bronco II vehicles.

The cases cited in Respondent’s Brief in response to the affidavits are wholly inapplicable to this case. In Naftchi v. New York Univ. Med. Ctr., 172 F.R.D. 130 (S.D.N.Y. 1997), the requested deponent was also a party to the case. Plaintiffs’ requested deponents are not parties to this case. In Ierardi v. Lorillard, Inc., No. Civ. A. No. 90-7049, 1991 WL 158911 (E.D. Penn. August 13, 1991), and Overseas Exch. Corp. v. Inwood Motors, 20 F.R.D. 228 (S.D.N.Y. 1956), the corporations stated none of their officers have any knowledge of the facts of the cases. Ford offered to produce its corporate representative on the issue requested by plaintiffs—an offer which plaintiffs declined.

Respondent’s Brief inexplicably attempts to introduce Ford’s efforts to reasonably accommodate plaintiffs’ requests and avoid continuing litigation on this issue as somehow constituting an admission that the “Bronco II/Continental General v. Explorer/Firestone” comparison is discoverable subject matter. Regardless of how Respondent’s Brief presupposes Ford’s accommodation attempts, it does not eviscerate Respondent’s abuse of discretion in denying Ford’s motion For Protective Order and/or Motion to Quash and denying Ford’s Motion for Reconsideration.

IV. Rule 56.01 Requires the Analysis of Deposition Notices for “Apex” Employees as Enunciated in Crown Central

Respondent abused her discretion under Missouri’s Rules of Civil Procedure because she did not require a showing the requested parties had unique or special knowledge

on the Firestone issue, and she did not require plaintiffs to seek discovery on the Firestone issue from less intrusive means.

The framework utilized in Crown Central has been applied in federal and state cases throughout the country, and is also applicable in Missouri. See, e.g., Fogelbach v. Dir. of Rev., 731 S.W.2d 512 (Mo. Ct. App. 1987). The Crown Central framework is applicable to Missouri's Rules of Civil Procedure because Rule 56.01(c) provides protection from annoyance, oppression, undue burden, and expense. This Court should follow the Crown Central framework in analyzing the scope of Rule 56.01 to protect against for deposition of "apex" employees without unique or specialized knowledge on tangential issues while allowing plaintiffs to receive discoverable information.

The framework recognizes "apex" employees are "singularly unique and important individual[s] who can be easily subjected to unwarranted harassment and abuse. [They have] a right to be protected, and the courts have a duty to recognize [their] vulnerability." Mulvey v. Chrysler Corp., 106 F.R.D. 364, 366 (D.R.I. 1995). The framework provides necessary protection for "apex" employees while preserving trial judges' discretion to determine if the "apex" employees have special or unique knowledge of the requested issue. This framework provides guidance for trial judges' discretion and balances the competing interests claimed in the parties' briefs.

V. The Case Law Cited by Respondent Supports Relator's Position on "Apex" Depositions

Respondent's Brief contains several cases purportedly supporting the denial of Ford's Motion for Protective Order and/or Motion to Quash. However, the cases do not support allowing "apex" depositions under the facts present in this case.

For instance, Respondent relies on Naftchi v. New York University Medical Center, 172 F.R.D. 130, 132 (S.D.N.Y. 1997) in support of her argument that the statements made in the affidavits of Messrs. Nasser, Rintamaki, and Baughman do not excuse them from being deposed. In Naftchi, plaintiff brought suit against New York University ("NYU"), Dr. Saul Farber and other defendants, alleging he was discriminated against based on his national origin and age. Id. at 130, 131. Plaintiff was a tenured professor of rehabilitation medicine at NYU Medical Center. Id. Defendant Farber was the dean and chairman of the Department of Medicine of the NYU School of Medicine. Id. Defendant Farber alleged he should not be deposed because he had no recollection of communicating with plaintiff in the past 10 years and did not make decisions concerning plaintiff's salary, research funding, and office or laboratory space. Id. at 132. Although the court acknowledged the broad scope of discovery allowed by the Federal Rules of Civil Procedure, the court went on to state:

There are, to be sure, some exceptions to this rule. Courts, on occasion, have barred the depositions of senior corporate officers where it was clear that the witness lacked personal familiarity with the facts of the case.

Id. The court proceeded to find that, although defendant Farber stated in his affidavit that he had not spoken to plaintiff in over 10 years, defendant Farber did not claim he had not

spoken with others about plaintiff during that time period. Id. Furthermore, defendant Farber did not claim he lacked knowledge concerning defendant's salary, research funding, and office and laboratory space. Id. First, unlike defendant Farber, the requested deponents in this case are not parties to the action. Furthermore, there is no evidence the proposed deponents worked closely with the decision makers, or had any knowledge of the decisions made regarding the Firestone issues raised in this case. Finally, the CEO of Ford Motor Company is a vastly different position than the chair of a university department. In Naftchi, although defendant Farber had no recollection of speaking with the plaintiff, he was the head of plaintiff's department and would have been working closely with those making decisions within the department.

Respondent's Brief also cites Overseas Exch. Corp. v. Inwood Motors Inc., 20 F.R.D. 228, 229 (S.D.N.Y. 1956) purportedly supporting the proposition that the requested deponents' affidavits stating they have no knowledge of the facts in this case does not prevent them from being deposed. However, in Overseas Exch. Corp., the defendant corporation refused to designate any 30(b)(6) deponent, citing lack of knowledge of all of its officers. Id. In support of their position, the officers submitted affidavits declaring lack of knowledge. Id. The court ordered the deposition of the defendant's assistant secretary after he admitted he was familiar with the facts and circumstances surrounding the case. Id. at 229. In contrast, Ford made available for deposition several employees with knowledge of facts relevant to this case pursuant to 30(b)(6). Furthermore, unlike the assistant secretary

in Overseas Exch. Corp., none of the proposed deponents have any first-hand knowledge of the issues in the case.

Likewise, in Ierardi v. Lorillard Inc., 1991 W.L. 158911 (E.D. Pa.), defendant Hollingsworth and Vose Company (H&V) refused to designate a corporate employee pursuant to 30(b)(6), stating no H&V employees had personal knowledge of the issues in the case. Id. at *1. The court ordered H&V to designate a 30(b)(6) deponent, stating “If none of defendant’s current employees has sufficient knowledge to provide plaintiffs with the requested information, defendant is obligated to ‘prepare [one or more witnesses] so that they may give complete knowledgeable and binding answers on behalf of the corporation.’” Id. at *1 (quoting Marker v. Union Fidelity Life Ins. Co., 125 F.R.D. 121, 126). Ierardi is not applicable to this case. Unlike H&V, Ford is not claiming a complete lack of knowledge on behalf of the corporation. Ford offered to produce corporate representatives on the Firestone issue and designated its employees most likely to have knowledge of the facts and circumstances on the Firestone issue. Plaintiffs refused this accommodation.

Parkhurst v. Kling, 266 F. Supp. 780 (E.D. Pa. 1967) cited by Respondent also fails to support the allegation that the requested deponents’ affidavits should be disregarded. In Parkhurst, plaintiff sought to depose the wife of a defendant who was a party to a telephone conversation which the plaintiff had recorded. Id. at 781. The court allowed the deposition despite an affidavit by defendant’s wife stating lack of knowledge. Id. This case is inapplicable to the case at bar. The proposed deponent in Parkhurst was not an “apex” employee of the defendant, but rather, his wife. Obviously, allowing a deposition of a

party's wife to go forward despite her claim of lack of knowledge is much different than allowing a deposition of a top executive of a major corporation with no unique or superior knowledge of the issues in the case.

In its brief, Relator relied on Armstrong Cork Co. v. Niagra Mohawk Power Corp., 16 F.R.D. 389 (S.D.N.Y. 1954). The court in Armstrong refused to allow the depositions of “apex” employees citing their lack of first-hand knowledge. All the cases

cited in Respondent's Brief are easily distinguishable from this case. In all those cases, the high level executives had superior or unique knowledge of the issues in the case.²

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2. See Six West Retail Acquisition, Inc. v. Sony Theater Management Corp., 2001 WL 1033571 (S.D.N.Y. 2001) (deposition allowed where defendant's high level executive had participated in discussions regarding the contracts in dispute and where plaintiff had already engaged in extensive discovery including deposing defendant's 30(b)(6) designees); A.I.A. Holdings, S.A. v. Lehman Bros. Inc., 2000 WL 1538003 (S.D.N.Y. 2000) (deposition allowed where defendant's chairman had direct contact with

plaintiffs concerning the subject matter of the action despite claimed lack of recollection by chairman; court places extensive restrictions on deposition, such as limiting to two hours unless chairman's testimony reveals he has discoverable information); Speadmark, Inc. v. Federated Dept. Stores, Inc., 176 F.R.D. 116 (S.D.N.Y 1997) (court allows deposition where chairman and CEO of defendant corporation was directly involved in 10-20 meetings regarding the contract at issue).

Respondent's Brief also asserts the "apex" doctrine does not apply where the "apex" employee has first-hand knowledge of relevant facts. Respondent claims Simon v. Bridewell, 950 S.W.2d 439 (Tex. Ct. App. 1997) and Boales v. Brighton v. Builders, Inc., 29 S.W.3d 159 (Tex. Ct. App. 2000) supports her argument. Both cases can be distinguished from the case at bar. In Simon, the court found the "apex" doctrine inapplicable for several reasons. One reason cited by the court for not applying the doctrine was that the entity in question was not a corporation, but a limited partnership. Simon, 950 S.W.2d at 443. The court concluded the facts of the case did not warrant extension of the doctrine to protect the partners. Id. In addition, the court found a protective order should not issue to prevent an "apex" deposition if the "record affirmatively reflects that the party seeking discovery has already exhausted other avenues for conducting discovery." Id. The requesting party in Simon had engaged in extensive discovery for over eighteen months before requesting depositions of "apex" employees. Id. Finally, the court held the doctrine did not apply to preclude the deposition of parties to the lawsuit. Id.

Simon does not support plaintiffs' position that the "apex" doctrine does not apply in this case. First, Ford is a multinational corporation, not a limited partnership. Furthermore, plaintiffs in Simon had engaged in extensive discovery before noticing the depositions of defendants upper level officers. Here, plaintiffs seek the depositions of Ford's "apex" employees despite conducting very limited discovery and before taking the depositions of any other Ford employees. Furthermore, unlike the defendants in Simon, Ford's "apex" employees are not parties to this lawsuit.

The Boales case also fails to support plaintiffs' position. In Boales, plaintiff sought to depose defendant's general counsel. Boales, 29 S.W.2d at 168. The general counsel gave his employer advice regarding the contract at issue in this business dispute. Id. The "apex" doctrine did not apply, the court stated, because the corporate official was sought due to his first-hand knowledge of the issues involved in the suit.³ Id. Again, Ford's "apex" employees have no first-hand knowledge of the issues in this case. Boales is inapplicable.

The case law cited in Respondent's Brief does not support the position that affidavits should simply be ignored. The cases cited in Respondent's Brief are clearly factually distinguishable from this case. First, in all the cases cited in Respondent's Brief, the deponents either had first-hand knowledge of the issues in the lawsuit, were parties to the lawsuit, or were not "apex" employees. Second, plaintiffs here have never attempted less intrusive means of discovering information on a comparison between Bronco II vehicles equipped with Continental General tires and Explorers equipped with Firestones. Finally, Ford's "apex" employees are not parties to this lawsuit, as were many of the persons allowed to be deposed in the cases cited in Respondent's Brief.

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3. Despite the court's refusal to apply the "apex" doctrine, the protective order was upheld because the communications between the employer and its general counsel were privileged. Boales, 29 S.W.3d at 168.

VI. The Depositions of Relator’s “Apex” Employees Will Result in Significant Disruption and Cost Compared to the Marginal Relevance of the Discovery Sought

Respondent argues that allowing these depositions to go forward will decrease future depositions. However, the underlying litigation undermines plaintiffs’ policy arguments.

Ford offered numerous accommodations to plaintiffs’ requests for information on the Firestone issue. First, Ford offered plaintiffs transcripts of the requested deponents’ depositions in the Firestone MDL proceedings. Plaintiffs refused this offer. Subsequently, Ford offered two corporate representatives on the Firestone issue: Tim Davis, Quality Director of North America, and Ernest Grush, Corporate Technical Specialist - Environmental & Safety Engineering (also requested by plaintiffs). Plaintiffs refused this offer. Finally, Ford offered to produce Messrs. Nasser, Rintamaki, Baughman, and Grush for a half-day each. Plaintiffs also refused this offer.

Ford has made significant unsuccessful attempts to accommodate plaintiffs’ requests for information on the Firestone issue. However, the record establishes (and Respondent’s Brief does not dispute) plaintiffs never attempted to obtain the information sought (differences perceived to exist between the current Firestone/ Ford Explorer litigation and perceived “problems” 15 years ago with Continental General tires on Ford Bronco II vehicles) through less intrusive means. Plaintiffs’ refusal to obtain the Firestone information

through less intrusive means demonstrates and verifies the necessity of a framework prohibiting the harassment of Ford's "apex" employees.

An "apex" employee's time and exigencies of his/her everyday business would be severely impeded if every plaintiff filing a petition is allowed to depose the "apex" employees. See, e.g., Union Sav. Bank v. Saxon, 209 F. Supp. 319, 319-20 (D.D.C. 1962). *Amicus Curiae* Melinda Daina Billingsley, individually and as next friend of Anthony Ray Billingsley, and John T. and Eleanor Billingsley ("Billingsley") further demonstrate the necessity of a framework prohibiting the harassment of Ford's "apex" employees.

Amicus Curiae Billingsley's case against Ford does not even involve Continental tires. The Billingsley Brief suggests "apex" employees' depositions are "a vital step in proving a punitive damages case." (*Amicus Curiae* Billingsley's Brief, p. 14). Under this rationale, every plaintiff simply pleading punitive damages against a corporation would be entitled to depose that corporation's "apex" employees. This construction is extraordinarily burdensome and unworkable to "apex" employees of big and small businesses operating in Missouri. *Amicus Curiae* Billingsley's Brief fundamentally demonstrates the necessity of a framework for "apex" depositions in Missouri.

Moreover, *Amicus* Billingsley and *Amicus* Goff's cross-notice for depositions further demonstrate the rush of deposition notices anticipated if this Court allows plaintiffs to depose "apex" employees without any showing the "apex" employees have any unique or superior knowledge, and without any showing plaintiffs sought the requested information through less intrusive means.

Respondent's construction of Missouri's discovery rules essentially requires the deposition of Ford's "apex" employees in any lawsuit, within seven days, involving Ford Motor Company. This construction is extraordinarily burdensome and unworkable to "apex" employees of all businesses in Missouri.

CONCLUSION

It is not difficult to see why MATA and the other interested amicus/plaintiff's attorneys would like to see the depositions of Ford's "apex" employees go forward. Respondent's analysis in denying Ford's Motion for Protective Order allows plaintiff's attorneys in Missouri a method of using discovery to gain a tactical advantage with the trial court and force corporations into a choice of potentially accepting court sanctions or interrupting their business operations in order to accommodate plaintiff's attorneys in lawsuits where it is clear the information is available through less burdensome means and requires no attempt to obtain the information elsewhere. It bears restating that Respondent and plaintiffs in the underlying lawsuit failed to point to one alternative means of discovery, be it a corporate deposition or other means, which was attempted on the subject matter raised by plaintiffs: a comparison between the irrelevant Explorer/Firestone situation and an unproven "problem" with the Bronco II and Continental General tires. The purpose of discovery is not intended to be an alternative means for plaintiffs to litigate the merits of their claims against a corporation and preclude the corporation from defending their product. Under Rule 56.01, a line exists providing a boundary for discovery requests. That line was crossed when Respondent denied Ford's motion.

CERTIFICATE REQUIRED BY SPECIAL RULE NO. 1(C)

The undersigned does hereby certify that this brief complies with Special Rule No. 1(b), and contains 4,514 words. The undersigned further certifies that a floppy disk containing Relator's Brief was filed with this brief in compliance with Special Rule No. 1(f), and that the disk is virus free.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify, pursuant to Special Rule No. 1, that (1) a hard copy of the foregoing document in the form specified by Special Rule No. 1(a) and (2) and a copy of the disk required by Special Rule No. 1(f), was sent via U.S. Mail this 6th of November, 2001, to the individuals below. The undersigned does also hereby certify that the disk required by Special Rule No. 1(f) is virus-free.

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